***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

44

# BRIEF FOR APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,138



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UNITED STATES OF AMERICA,

Appellee,

v.

PAULINE BRIGGS,

Appellant

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On Appeal from the United States
District Court for the District of Columbia

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## This Case Has Not Previously Been Before This Court

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District Court for the District of Columbia

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# BRIEF FOR APPELLANT

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## REFERENCES TO RULINGS

The District Court did not issue any findings or conclusions, nor any opinions.

## STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the District of Columbia convicting appellant

of the offenses of Armed Robbery (22 D.C. Code sec. 3202) and Assault With Dangerous Weapon (22 D.C. Code sec. 502).[1] On April 7, 1970, the District Court sentenced appellant to serve from two to seven years, concurrent with any sentence being served (Pl. 14).[2] A timely notice of appeal was filed, and this Court has jurisdiction pursuant to 28 U.S.C. §1291.

## The Facts

The relevant testimony adduced at the trial before Judge June L. Green and a jury may be summarized briefly as follows:

### 1. The Testimony at the Trial

Mrs. Hazel Lynn, a witness for the Government, testified that on March 30, 1969, at about 6:15-6:30 A.M. she was on duty as day manager in the office of the Fulton Hotel, 512 Eye Street, N.W., in the District of Columbia (Tr. 83, 86-89, 100-101).[3] Mrs. Lynn testified that appellant, who she had seen once a few months before and who she knew from that time as "Polly," and a "colored

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1/ Appellant was indicted by the Grand Jury on June 10, 1969, on three counts: (One) Armed Robbery, (Two) Robbery, (Three) Assault With Dangerous Weapon (22 D.C. Code secs. 3202, 2901, 502) (Pl. 10). The Court did not require a verdict on the Robbery count (Pl. 9). "Pl." refers to the "Duplicate Transcript of Pleadings, Etc." filed with this Court on April 14, 1970.

2/ The District Court amended its March 16 order which had the sentence run consecutively to sentence being served (Pl. 11).

3/ "Tr." refers to the Transcript of Testimony at the trial.

boy" entered the hotel (Tr. 86-89, 96-97, 101-113, 118-120). Mrs. Lynn testified that she immediately recognized "Polly" as soon as she walked into the hotel (Tr. 106). She stated that while the boy engaged her in conversation at the teller's window "Polly" went around out of sight and broke in a side door leading into the office (Tr. 87-89, 96, 106-109, 112-114). Mrs. Lynn testified that the two then came into the office and that while the boy held a screwdriver[4/] against her neck "Polly" took $25 cash from a drawer, and that the two then ran out (Tr. 89-92, 114-115).

Mrs. Lynn testified that the police arrived at the hotel shortly thereafter, at about 8:30 A.M., and that, "They asked me did I know who it was, something like that. * * * And I said, 'Yes, I think it is Polly.'" (Tr. 93-94, 96-97). Mrs. Lynn testified that she told the police that "Polly had on a three-quarter gray coat and gray slacks, and the boy had on brown pants and a black leather jacket that zips up the front," and that "Polly was five six 125, and the boy was five five, 130" and that the boy was "20 or 21 and Polly was about 23" (Tr. 93-94, 128-129).

Mrs. Lynn testified that the next morning Officer Cvetnick showed her some photographs and said, "Here are some pictures for

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4/ Mrs. Lynn described the screwdriver as "real, real long, shiny, pointed on the end" (Tr. 115), about twelve to fourteen inches long (Tr. 125).

you to look at and see if you know any of them' - whether or not, you know, 'see if there is any pictures of the one that robbed you'" (Tr. 97). Mrs. Lynn testified that, "I looked at some of them until I come to the picture of Polly and then I stopped looking at them. There wasn't no sense in me looking at the rest of them when I had already picked out the girl that came in our office" (Tr. 97). She stated that she handed the picture to the officer and said that "This is Polly" and that she was the one who had robbed her (Tr. 97-98). Mrs. Lynn testified further that she attended a lineup a few days thereafter,[5/] that she was instructed "Want you to come in the lineup and see if you see anybody in here that identify as the one that robbed you," that she identified "Polly" as being the one who robbed her, and that "Polly" was appellant in the courtroom (Tr. 98).

Mrs. Lynn testified that in January 1969 she had entered the lobby of the Victory Hotel in the District of Columbia, walking distance from the Fulton, that two women were in the lobby talking loudly, that she went into the hotel office and asked, "Who is that talking all that loud, talking out there?" and "They said, 'That is Polly.'" (Tr. 84-85, 118-125). She stated that she then "looked out the [office] window because I had heard about Polly and I

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5/ Defendant's trial counsel was present at the lineup (Tr. 6, 46, 135).

wanted to see who Polly was," and that she then watched her for a few minutes (Tr. 85). Mrs. Lynn also testified that she was not told which of the two women was "Polly," nor was it pointed out to her (Tr. 122-123), but that she knew or understood which one was "Polly" (Tr. 124-125).

William V. Cole, a witness for the Government, testified that on March 30, 1969, he had gone off duty as night clerk at the Fulton and was upstairs when he heard a commotion, that he came downstairs and Mrs. Lynn "hollered" that she had been robbed, and that he saw one woman and two men go out the door (Tr. 56-57, 68-70). He stated that he did not get a look at their faces (Tr. 57, 70). Mr. Cole testified that he chased them down the street, did not catch anyone, and was not able to identify anyone as having committed the robbery (Tr. 57-58, 70-73).[6/] He testified that the next day the police showed him some photographs, that he could not identify anyone in the photographs as having committed the robbery, but that he did see a photograph of appellant who he knew as "Polly" in the group (Tr. 64, 74-75). Mr. Cole also testified that he attended a lineup, that he could not identify anyone in it as having committed the robbery, and that appellant was in the lineup (Tr. 64, 75-76). He testified that, "I have been around the neighborhood a long time

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6/ Mr. Cole testified that the persons ran south on Sixth Street, that the girl then turned the corner onto H Street and the two men kept straight down Sixth Street (Tr. 71-72).

and I have seen her around a lot. * * * Everybody calls her Polly." (Tr. 75).

Officer T. Max Cvetnick, a witness for the Government, testified that he had worked in the First Precinct downtown area where the robbery occurred for eleven years, that he had known Hazel Lynn for four or five years, that he knew appellant as "Polly Washington," and that he had known her for four or five years (Tr. 130, 136). He testified that he knew appellant in his "capacity of walking the beat up in that area" (Tr. 137). Officer Cvetnick testified that Mrs. Lynn "said she knew her [appellant]. I don't know how well she knew her. She may have seen her one time." (Tr. 137). He testified that he questioned Mrs. Lynn the morning of March 30 concerning the robbery and "she said that she knew the female that had come in there and knew her as Polly" (Tr. 131). Officer Cvetnick testified that the following morning at 6:30 he took twelve photographs and showed them to Mrs. Lynn, "and when she came to number nine she didn't look any more. She said, 'This is Polly.'" (Tr. 133). He testified that Mrs. Lynn identified appellant at a lineup as being "Polly" and as having been involved in the robbery (Tr. 135).

Officer Cvetnick further testified that the police officers who arrived at the scene after the robbery made an investigation, and that one police officer "canvassed the area, the house down

on the other corner, one of them the subject was supposed to have run into which is 703 Sixth Street" (Tr. 142). Officer Cvetnick testified that, "One of the subjects ran into [703] and through my association on the beat I knew that the defendant also lived in there on and off over a period of time" (Tr. 143). He testified that appellant was eventually arrested two blocks from the Fulton Hotel "on the steps of 703 Sixth Street" (Tr. 143).

Appellant's mother, Mrs. Beatrice Briggs, a witness for the defense, testified that appellant came to her house at about 5:30-6 A.M. on March 30, and left at about 8 A.M. (Tr. 155-165).[7/]

2. The Determination Concerning the Admissibility of Appellant's Prior Convictions.

During bench colloquy at the outset of the trial the Government indicated that appellant had a criminal record dating from 1950 and including convictions for vagrancy, forgery, larceny and prostitution offenses (Tr. 49-51).[8/] Over the question of appellant's trial counsel, the District Court ruled that if appellant testified the Government would be permitted for impeachment purposes to intro-

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7/ Mrs. Briggs testified that it was dark out when appellant arrived; the parties stipulated that sunrise on March 30 was at 5:56 A.M. (Tr. 157-158, 164, 170).

8/ According to the Government's summary of the police record appellant used her own name, Pauline Briggs, as well as Pauline Washington, Polly Washington, Pauline Hodges, Pauline Kollock, and Polly Kollack (Tr. 50).

duce two larceny convictions, one from 1964 and one from 1966 (Tr. 51-52). At the close of the Government's case appellant's trial counsel indicated that appellant had an alibi defense which only she could establish and asked the District Court to reconsider its ruling (Tr. 146). The District Court adhered to its ruling that the two convictions would be admissible (Tr. 147), and appellant did not testify.[9/]

3. The Hearing on Appellant's Motion to Suppress Photographic Identifications

After a hearing conducted out of the presence of the jury at the outset of the trial (Tr. 3-48), the District Court denied appellant's oral motion to suppress the photographs (G.X. 1)[10/] shown by the police to Mrs. Lynn the day following the robbery, and Mrs. Lynn's identification of appellant therefrom (Tr. 3-4, 7, 48). The District Court found "absolutely nothing out of order in the showing of the photographs" and ruled Mrs. Lynn's identification testimony admissible at the trial (Tr. 42). The District Court also rejected appellant's contention that the photographs were dissimilar and therefore improperly suggestive (Tr. 47).

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9/ The District Court also denied appellant's motion for judgment of acquittal (Tr. 144-146).

10/ "G.X." refers to Government exhibits. G.X. 1 consists of twelve photographs introduced into evidence at the suppression hearing, not at the trial (Tr. 33, 35).

At the suppression hearing, Mrs. Lynn testified that she picked out the photograph numbered "9" as being appellant, "Polly," and identified her as the person committing the robbery (Tr. 20-21, 35). Mrs. Lynn also testified that she had heard of "Polly" over the years, that "There was something that happened sometime or another -- I don't know when -- in the Fulton Hotel before," and that "I just hear them talking about Polly did this and Polly did that" (Tr. 37). Mrs. Lynn also testified that "she looks better today than she did any other time" (Tr. 39).[11/]

Officer Cvetnick testified at the suppression hearing that when he first talked with Mrs. Lynn she stated that she knew appellant as "Polly," and that "She had seen her many times in the neighborhood" (Tr. 46).

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11/ The Government indicated that Mrs. Lynn and Mr. Cole were aware that a tenant of the Fulton Hotel filed a grand larceny complaint and obtained a warrant for the arrest of appellant on June 22, 1968, and that the complainant subsequently withdrew the complaint (Tr. 49). The Government also indicated that Mrs. Lynn knew "that the defendant is known in the area as a prostitute" (Tr. 49).

## ARGUMENT

### I. The Introduction of Adverse Material Concerning Appellant's Reputation Constituted Prejudicial Error.

The Government filled the record with adverse and prejudicial material and innuendo concerning appellant's reputation, morality, and police contacts. This was "plain error"[12/] warranting reversal. For the law "simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief." Michelson v. United States, 335 U.S. 469, 475 (1948). "To thus digress from evidence as to the offense to hear a contest as to the standing of the accused, at its best opens a tricky line of inquiry as to a shapeless and elusive subject matter. At its worst it opens a veritable Pandora's box of irresponsible gossip, innuendo and smear." Michelson, supra, 335 U.S. at 480.

Compare the statement in 1 B. Jones, Evidence, §162 at 290 (5th ed. 1958), quoted in United States v. Bailey, No. 22,431 (D.C. Cir., March 20, 1970) at 10-11, n. 16: "One basic reason for the rule [prohibiting the introduction in a case on trial of evidence of wholly independent offenses] is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting

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12/ Rule 52(b), Federal Rules of Criminal Procedure: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged."

Thus, Officer Cvetnick testified that he had worked in the First Precinct downtown area for eleven years, that he knew appellant as "Polly Washington," that he had known her for four or five years, and further that he knew her in his "capacity of walking the beat up in that area" (Tr. 137). He also testified that appellant was "supposed to have run into" a house at 703 Sixth Street,"[13/] that she was subsequently arrested there, and that "through my association on the beat I knew that the defendant also lived in there on and off over a period of time" (Tr. 142-143). Indeed, at one point the District Court Judge commented to counsel that, "I feel like we are skating on such thin ice all the time. * * * I am so afraid that he will blurt out why they are all acquainted with the name, etc., and it seems to be that it is not worth the problem you are going to have" (Tr. 139).

The Government elicited testimony from Mrs. Lynn that in January 1969 she had seen appellant with another girl in the lobby of the Victory Hotel, creating a scene, that the people at the Vic-

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13/ No witness testified to such effect. On the contrary, William Cole testified that "the girl" turned the corner onto H Street (Tr. 71-72). The introduction of this statement compounded the error.

tory Hotel were familiar with "Polly," and that she specifically asked about and then observed appellant "because I had heard about Polly and I wanted to see who Polly was" (Tr. 85) and "I had heard so much about Polly" (Tr. 125). She stated that even though she was not told or shown which of the two women was "Polly" she nevertheless knew or understood which one was "Polly" (Tr. 122-125).

Even though it was quite clear that William Cole had not identified appellant as a participant in the robbery either from the photographs or at the lineup, the Government nevertheless elicited testimony from Mr. Cole that he recognized appellant's picture in the group and that he knew who she was, and that he recognized her at the lineup (Tr. 64, 74-75). Indeed, Mr. Cole was permitted to state that, "I have been around the neighborhood a long time and I have seen her around a lot. * * * Everybody calls her Polly" (Tr. 75).

The foregoing material, which was not necessary to the Government's case, not material, and could have been avoided, was loaded with prejudicial content concerning appellant's notoriety, reputation, morality, and contacts with the law. The Government thus advised the jury somewhat indirectly of what it advised the District Court Judge directly, namely, that "defendant is known in the area as a prostitute" (Tr. 49).[14/]

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14/ Failure of defense counsel to object to the material does not detract from the existence of plain error here, for defense counsel

II. The District Court Erred in Ruling that Certain of Appellant's Convictions Would be Admissible into Evidence if Appellant Testified.

Appellant's trial counsel indicated that appellant had an alibi defense which only she could establish (Tr. 146). The District Court ruled that if appellant testified the Government would be permitted for impeachment purposes to introduce two larceny convictions, one from 1964 and one from 1966 (Tr. 51-52, 147). Appellant did not testify. The District Court abused its discretion by not excluding all convictions in this case.

As stated in United States v. McCord, No. 22,308 (D.C. Cir., December 1, 1969) at 2:

> Under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) and Gordon v. United States, 127 U.S. App. D.C. 342, 383 F.2d 936 (1967), "[t]he defendant with a criminal record may ask the court to weigh the probative value of his convictions against the degree of prejudice which revelation of his past crimes would cause, and he may ask the court to consider whether it is more important for the jury to hear his story than to hear about the prior conviction in relation to his credibility.
>
> * * *
>
> While, as a matter of law, a defendant is always vouchsafed the constitutional right to testify regardless of the trial court's grant or denial of his request for immunity from impeachment by his prior criminal record, as a practical matter an adverse ruling may effectively foreclose a defendant from taking the witness stand, lest his past misdeeds be his undoing at his present trial.

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was clearly faced with the problem that objection would unduly emphasize the material. "We do not think the Government may now complain that the defense failed to impale itself upon one horn or the other of the dilemma imposed upon it by the prosecutor's lapse." Garris v. United States, 129 U.S. App. D.C. 96,99, 390 F.2d 862, 865 (1968).

A highly relevant consideration to the adjudication on impeachment by prior convictions is "the importance, in the search for truth, of giving the triers of fact the benefit of the accused's testimony." United States v. Coleman, No. 22,315 (D.C. Cir., July 11, 1969) at 4-5. The trial judge must consider "above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." Luck v. United States, 121 U.S. App. D.C. 151, 157, 348 F.2d 763, 769 (1965).

Here, as in Coleman, supra, at 5, "appellant's version of the affair, unembarrassed by mention of his previous difficulties with the law, could very well have been crucial." Apparently only appellant hereself could present the alibi defense covering all of the relevant periods of time involved. The testimony of appellant's mother showed that appellant had a potential alibi defense, and showed further that appellant's mother was not in a position to specifically account for appellant's whereabouts during the precise times in question. Because that was appellant's only defense, and because she was the only witness who could meaningfully present that defense, she should have been permitted to testify free of her prior criminal record. This is especially so where as here the Government had already filled the record with so much adverse and prejudicial material and innuendo concerning appellant's reputation,

morality and police contact. Further allowances to the Government were hardly necessary to vindicate the Government's rights in the search for truth.

III. Whether the Photographic Identification Procedure Used Here Was Unduly Suggestive, and the Subsequent References to the Photographs Improper.

The police use of the photograph identification procedure here, as well as the particular selection of photographs used, constituted an improper police practice sufficiently serious and prejudicial as to warrant reversal of appellant's conviction as well as condemnation. Mrs. Lynn knew appellant, Officer Cvetnick knew appellant, Mrs. Lynn stated that she recognized appellant the moment she entered the hotel, and she identified appellant by her commonly known nickname to the officer. The officer had no apparent difficulty in immediately selecting appellant's photograph for inclusion in the group shown Mrs. Lynn and Mr. Cole. No pre-lineup confrontation was needed here.

In Simmons v. United States, 390 U.S. 377, 384 (1968), the Supreme Court stated that, "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through

scrutiny of photographs." No such rationales support the procedure here. And in Simmons the Supreme Court specifically noted that "it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance" (Id. at 384).

The photographic identification here was neither "imperative" (Stovall v. Denno, 388 U.S. 293, 302 (1967)), nor "essential" (Simmons, supra, 390 U.S. at 385), nor was there any "urgent character" to the circumstances (Clemons v. United States, 133 U.S. App. D.C. 27, 33, 408 F.2d 1230, 1236 (1968)), nor were the police faced with "inconclusive clues" (Simmons, supra, 390 U.S. at 384).

The photographic identification did not pass the due process test of Simmons, supra, which, as stated by this Court in Bryson v. United States, U.S. App. D.C. , , 419 F.2d 695, 700 n. 23 (1969), is "whether 'the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"[15/] "[A] claimed violation of due process of law in the conduct of the confrontation

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15/ "In the case of photographs, Simmons makes clear that only a due process (or, in the case of federal prosecutions, an appellate supervisory power) issue can be involved where the police problem is one of getting leads to possible suspects. A due process violation in this area will largely be a function of the need given by the police to the considerations alluded to in Simmons as relevant to the fair use of photographs." Clemons v. United States, 133 U.S. App. D.C. 27, 34-35, 408 F.2d 1230, 1237 (1968).

depends on the totality of the circumstances surrounding it * * *." Stovall, supra, 388 U.S. at 302. "[W]hile a photographic identification may, indeed, present problems of fairness, the problem is to be considered in terms of whether the identification has been conducted with impermissible suggestiveness." United States v. Kirby, No. 23,106 (D.C. Cir., April 24, 1970) at 3.

Each of the twelve sets of photographs (G.X. 1) was about the size of a postcard and contained two black and white pictures about 2" x 2" each of a female person. Each set had a border around all of the edges as well as a border down the middle separating the two pictures. Appellant's picture was numbered "9."

Each of the sets of two photographs had dark black borders around all edges and down the middle, except appellant's which had bright white borders and dividing line. All of the pictures were somewhat hazy, fuzzy or obscure, except appellant's which was crystal clear with her dark skin prominent against a bright, white background. The shading of skin cannot be determined on the various pictures, indeed on pictures "5" and "7" it cannot be determined if the person is white or black, Caucasian or Negroid, whereas on appellant's picture, as noted, her dark skin is strikingly prominent. The persons on all of the pictures have full heads of hair or full wigs, and one has on a hat, whereas on appellant's picture her hair is worn thin and close to her head.

In the pictures appellant looks at least ten years older than any of the others (excepting perhaps "4" and "11"). All of the photographs look old, whereas appellant's looks fresh and recent. On one of appellant's pictures a clear sign hangs from her neck and across her chest stating "MPC 170 768 6-22-68" . The signs worn in the other pictures bear dates of 1961, 1962, 1963, 1964, 1965, 1967, 1968 and 1969.16/

As stated in People v. Pedercine, 63 Cal. Rptr. 873, 878 (Ct. App. 3d Dist. 1968): "We must believe that the selection of photographs was purposeful. No real selection was offered. The set of photographs exhibited to the witnesses was obviously 'rigged.' * * * This was a deliberate pervicacious practice calculated to nail down an identification later to be used in court. Because reasonable minds cannot differ on this we must condemn the practice as a matter of law."17/

Moreover, while Mrs. Lynn may in fact have been able to make an independent identification of appellant, this does not cure the prejudicial impact of the introduction into evidence of the fact that

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16/ Specifically, the signs read: (1) 11-19-63; (2) 2-26-69; (3) 10-4-65; (4) 6-14-68; (5) 2-14-64; (6) 5-30-61; (7) unclear; (8) unclear (maybe 2-29-68); (9) 6-22-68; (10) 8-4-62; (11) 3-18-67; (12) 1-13-67.

17/ In Pedercine, the Court concluded that no prejudicial error existed because of evidence independent of the improper identification.

the police had photographs of appellant. For while the photographs were not introduced into evidence at the trial, the Government elicited testimony from Mrs. Lynn, Mr. Cole and Officer Cvetnick about the photographs and the identification of appellant therein. Since Mrs. Lynn could make an identification without the photographs, the introduction of evidence concerning them was not necessary and served only to inform the jury that appellant had a criminal record with "mug shots."

## CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed.

Respectfully submitted,

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Washington, D.C. 20006

Attorney for Appellant
(Appointed by this Court)

## CERTIFICATE

Copies of this brief have been served upon the United States Attorney, United States Courthouse, Washington, D. C. 20001.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,158

---

UNITED STATES OF AMERICA, APPELLEE

*v.*

PAULINE BRIGGS, a/k/a POLLY WASHINGTON, APPELLANT

---

Appeal from the United States District Court
for the District of Columbia

---

THOMAS A. FLANNERY,
*United States Attorney.*

JOHN A. TERRY,
CAROLINE H. ROSTACHER,
*Assistant United States Attorneys.*

Cr. No. 877-69

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| *Smith* v. *United States*, 256 A.2d 901 (D.C. Ct. App. 1969) | 9 |
| *Stovall* v. *Denno*, 388 U.S. 293 (1967) | 10, 11 |
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| *United States* v. *White*, D.C. Cir. No. 23,041, decided May 22, 1970 | 8 |
| *United States* v. *Williams*, —— U.S. App. D.C. ——, 421 F.2d 1166 (1970) | 5, 13 |
| *Watson* v. *United States*, D.C. App. No. 5048 decided February 17, 1970 | 8 |
| *Weaver* v. *United States*, 133 U.S. App. D.C. 66, 408 F.2d 1269 (1969) | 10 |


OTHER REFERENCES


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|---|---|
| 22 D.C. Code § 502 | 1 |
| 22 D.C. Code § 2901 | 1 |
| 22 D.C. Code § 3202 | 1 |


* Cases chiefly relied upon are marked by asterisks.

## ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether testimony concerning the government witnesses' prior knowledge of appellant constituted plain error?
2. Whether the trial court abused its discretion in ruling that two of appellant's prior convictions could be used for impeachment if she testified?
3. Whether the photographic identification was impermissibly suggestive?

* This case has not previously been before this Court.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,138

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UNITED STATES OF AMERICA, APPELLEE

*v.*

PAULINE BRIGGS, a/k/a POLLY WASHINGTON, APPELLANT

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

Appellant was indicted on June 10, 1969, on one count of armed robbery (22 D.C. Code § 2901 and 3202), one count of robbery (22 D.C. Code 2901) and one count of assault with a dangerous weapon (22 D.C. Code § 502). All charges stemmed from the armed robbery of the Fulton Hotel at 512 I Street, N.W., on March 30, 1969. On January 19, 1970, a pre-trial hearing on the propriety of photographic identifications made of appellant was held before the Honorable June L. Green. Judge Green ruled that the photographic identifications were proper in all respects and that testimony thereon would be admissible

at trial. The case then proceeded to trial by jury before Judge Green, and on January 21, appellant was found guilty on counts one and three of the indictment (no verdict was returned on count two). On March 10, 1970, appellant was sentenced to serve two to seven years in prison consecutively to any sentence then being served. On April 7, 1970, this sentence was amended to run concurrently with any then being served. This appeal followed.

**The Robbery**

Between 6:15 and 6:30 a.m. on March 30, 1969, a man and a woman entered the Fulton Hotel at 512 I Street, N.W. Mrs. Hazel Lynn, the day manager on duty at the time, immediately recognized the woman as "Polly," the appellant (Tr. 87).[1] Mrs. Lynn had seen Polly once before, about a year prior to the robbery (Tr. 84). The man walked up to Mrs. Lynn and asked for a room while Polly walked to the rear of the lobby "like she was going to the phone" (Tr. 87). While the man conversed with Mrs. Lynn, Polly suddenly appeared at the door to the entrance of Mrs. Lynn's office and demanded entrance. When Mrs. Lynn refused, Polly kicked the door in and entered the office. At this point the man brandished a screwdriver and joined Polly and Mrs. Lynn in the office. The man placed the screwdriver against Mrs. Lynn's neck, demanding money. Before Mrs. Lynn could show the man the location of the money, Polly opened the cash drawer in the office desk and seized $16 in bills and $9 in change. Both Polly and the man then ran from the hotel (Tr. 88-92).

**The Identification**

On March 31, 1969, Officer T. Max Cvetnick of the First District, Metropolitan Police, interviewed Mrs. Lynn. She told him that she recognized the woman robber as Polly (H. 43), a woman she had seen at the Victory Hotel

[1] "Tr." refers to the trial transcript. "H." refers to the transcript of the pre-trial hearing on the photographic identification.

a year prior to the robbery (H. 24-25). Officer Cvetnick returned the next morning and showed Mrs. Lynn a set of twelve photographs. Mrs. Lynn selected appellant's photograph as the female participant in the robbery. She also identified appellant at a lineup on April 11, 1969 (Tr. 134).

At the pre-trial hearing on the propriety of the photographic identification, the trial court, after studying the pictures, found that "the photographs are not suggestive in any way, that they are a fair group of individuals, all of similar age and description. Some have more hair than others but that is about the only thing that is different" (H. 47-48). The trial court then ruled that evidence of the photographic identification would be admissible for all purposes at trial (H. 48).

**The Trial**

At trial Mrs. Lynn gave a detailed account of the robbery (Tr. 86-92). She also testified as to her previous knowledge of appellant (Tr. 84), the pre-trial identifications (Tr. 97-98) and made an in-court identification of appellant (Tr. 98-99).

Mr. William Cole also testified as a Government witness. Mr. Cole was night manager at the Fulton Hotel on March 30, 1969. He testified that when Mrs. Lynn relieved him at 6:00 a.m. he went upstairs and started to undress. He then heard a commotion downstairs and upon investigation noticed three people exiting the door of the hotel. After Mrs. Lynn told him of the robbery, Mr. Cole chased these people down the street. He was unable to apprehend anyone, nor was he able to identify any of the robbers (Tr. 54-58). Mr. Cole then corroborated Mrs. Lynn's testimony as to the broken condition of the lock on the office door (Tr. 58-63).

Officer Cvetnick testified as to the pre-trial identifications of appellant (Tr. 132-135). He also corroborated Mrs. Lynn's and Mr. Cole's testimony in reference to the broken condition of the lock on the office door (Tr. 131-132).

Mrs. Beatrice Briggs, appellant's mother, was the only witness called by the defense. She testified that between 5:30 and 6:00 a.m. on March 30, 1969, appellant knocked on the door of her house and asked for cab fare. Moments after Mrs. Briggs gave appellant the money requested, appellant came back into the house, and went upstairs to bed. Appellant stayed upstairs until 8:00 a.m., when she again asked for cab fare. Appellant left her mother's house shortly thereafter (Tr. 154-159).

## ARGUMENT

### I. Testimony concerning the government witnesses' knowledge of appellant was not erroneously received.

(Tr. 75-76, 84-85, 87, 130, 136-137, 139-140) (H. 49).

Appellant argues that plain error was committed when "The [G]overnment filled the record with adverse and prejudicial material and innuendo concerning appellant's reputation, morality and police contacts" (Brief for Appellant at 10). Appellant contends that the testimony of *each* of the government witnesses contributed to the assault of her character. This assertion is totally unsupported by the record. An examination of the testimony of each witness is therefore in order.

#### *Mr. Cole*

The prosecutor simply asked Mr. Cole if he knew appellant and, if so, for how long. He answered that he had known her for three years (Tr. 56). On redirect examination the prosecutor elicited only the fact that Mr. Cole had seen her at the Victory Hotel (Tr. 76). We fail to see how these innocuos questions were "loaded with prejudicial content concerning appellant's notoriety, reputation, morality, and contacts with the law" (Brief for Appellant at 12). Appellant's trial counsel tactically decided to delve into Mr. Cole's source of knowledge by asking, "[H]ow many previous occasions had you seen her?"

Cole answered that he had "been around the neighborhood a long time and I have seen her around a lot" (Tr. 75). Since it was appellant's trial counsel who asked this question, she should now be precluded from assailing the answer. "Directing the tactics of defense counsel, as to mention of evidence over which he had the power of exclusion, was not within the province of the court if for reasons of trial strategy he saw fit to go into it" *United States* v. *O'Connor*, 282 F. Supp. 963, 968 (D.D.C. 1968), *aff'd*, —— U.S. App. D.C. ——, 420 F.2d 644 (1969); *cf. United States* v. *Lucas*, D.C. Cir. No. 23,162, decided April 8, 1970.

***Mrs. Lynn***

On direct examination Mrs. Lynn testified that she knew appellant from having seen her once about a year prior to the robbery. This meeting took place at the Victory Hotel (Tr. 84-85). She then testified that when appellant robbed her on March 30, 1969, she recognized appellant as "Polly" (Tr. 87). In *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969), and again in *United States* v. *Williams*, —— U.S. App. D.C. ——, 421 F.2d 1166 (1970), this Court emphasized the importance of permitting a jury to know all the circumstances surrounding a courtroom identification. Mrs. Lynn identified appellant from photographs, at a lineup and at trial. Certainly an important circumstance in the eyes of the jury as to the trustworthiness of Mrs. Lynn's courtroom identification of appellant was this prior encounter. As we read these cases, it is not only proper but desirable for such evidence to be before the jury.

***Officer Cvetnick***

Officer Cvetnick was asked by the prosecutor if he knew appellant. He answered in the affirmative (Tr. 130). All other questions relating to the officer's prior knowledge of appellant were asked by her counsel. Coun-

sel specifically brought to the jury's attention the fact that the officer knew appellant from stopping into "the hotel" (Tr. 136) and in the "capacity of walking the beat up in that area" (Tr. 137). The trial court then became concerned with the possible implications of this type of testimony, remarking, "I am so afraid that he will blurt out why they are all acquainted with the name, etc., and it seems to me that it is not worth the problem that you are going to have." (Tr. 139). Appellant's counsel responded, "I know that. I know that one [*sic*] of the problems" (Tr. 139). Both the Court (Tr. 139) and the prosecutor (Tr. 140) suggested to appellant's counsel that he was "on thin ice." Since appellant counsel tactically pursued this line of questioning, appellant cannot now complain. *United States* v. *O'Connor*, *supra*; *United States* v. *Lucas*, *supra*.

From an examination of the record we fail to see how appellant can legitimately argue that the Government opened a "vertiable Pandora's box of irresponsible gossip, innuendo and smear"[2] (Brief for Appellant at 10).

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[2] The intentions of the prosecutor with respect to any attack on Appellant's character are clear from the following except from the pre-trial hearing on the propriety of the pre-trial identification:

> THE COURT: I will hear from you, Mr. Harris.
>
> MR. HARRIS: I had no intention of having the complaining witness or Mr. Cole say that they are aware that a tenant of that hotel filed a grand larceny complaint and obtained a warrant for the arrest of Pauline Briggs on June 22, 1968. The warrant alleged grand larceny. The complainant subsequently withdrew the complaint. That is the previous incident in the hotel that occurred about six months before these events. I had no intention of going into that. I had already spoken to the witness about it. I am aware that no complainant on the witness stand can allege criminal acts by the defendant other than that with which they are charging the defendant so I did not propose to have that witness bring out either that the defendant is known in the area as a prostitute or that she had this arrest or any other matter of this nature. I deliberately avoided it and propose to continue to do so. (H. 49).

**II. The trial court did not abuse its discretion in ruling that two of appellant's prior convictions could be used for impeachment it she testified.**

(H. 50-52. Tr. 146-147)

Appellant argues that the District Court abused its discretion under *Luck*[3] and its progency when it ruled that two of her petit larceny convictions could be used by the Government for impeachment if she testified. Appellant bases her argument solely on the need "for the jury to hear the defendant's story [rather] than to know of a prior conviction" (Brief for Appellant at 14). We disagree. While *Luck* and its progency have set forth various factors to be considered by the trial court in exercising its discretion, this Court has continually pointed out that restricting the admissibility of prior convictions is an exercise of discretion, "and as is generally in accord with sound judicial administration, that discretion is to be accorded a respect appropriately reflective of the inescapable remoteness of appellate review." *Luck* v. *United States*, *supra*, 121 U.S. App. D.C. at 157, 348 F.2d at 769. "This is a recognition that the cold record on appeal cannot present all facets and elements which the trial judge must weigh in striking the balance" *Gordon* v. *United States*, 127 U.S. App. D.C. 343, 346, 383 F.2d 936 (1967) *cert. denied*, 390 U.S. 1029 (1968). Therefore, "such highly discretionary adjudications [will not be disturbed] unless the wisdom of doing so is very clear." *Brooke* v. *United States*, 128 U.S. App. D.C. 19, 26, 385 F.2d 279, 286 (1967). It is with this presumption of propriety in the trial court's exercise of discretion that we must view the instant case.

*Luck* tells us that the test is whether "the prejudicial effect of impeachment *far outweighs* the probative relevance of the prior conviction to the issue of credibility." *Luck* v. *United States*, *supra*, 121 U.S. App. D.C. at 156, 348 F.2d at 768 (emphasis added). Cases following *Luck*

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[3] *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

have delineated criteria to aid the trial court in the exercise of its discretion. Among the most important are the nature of the previous conviction,[4] its remoteness,[5] the age of the accused at the time of the conviction,[6] and whether that judgment resulted from a guilty plea or a trial.[7] Once the trial court determines the probative value of a conviction, it must then weigh this with the need for an accurate determination of credibility and the length of the accused's criminal record.[8] Next a balance must be sought between the above factors and the prejudicial effect of admitting the conviction. This balance should include a consideration of the similarity between the crime charged and the crime sought to be used for impeachment.[9] Finally, the trial judge must decide how important it is that the jury hear the defendant's story. In this regard, an important consideration is whether or not anyone else can place the defendant's story before the jury.[10]

In the instant case the record clearly indicates that the trial court exercised judicious discretion in its *Luck* ruling. Before trial the prosecutor informed the court that appellant had been convicted of vagrancy in 1959, forgery in 1960, larceny from an interstate shipment in 1963, larceny from the mail in 1964, and petit larceny in 1966 and 1970. The prosecutor then requested and was granted permission to impeach appellant *only* by the 1964 and

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[4] *E.g., United States* v. *White*, D.C. Cir. No. 23,041, decided May 22, 1970.

[5] *E.g., Gass* v. *United States*, —— U.S. App. D.C. ——, 416 F.2d 767 (1969).

[6] *E.g., Luck* v. *United States, supra*, 121 U.S. App. D.C. at 157, 348 F.2d at 769.

[7] *E.g., United States* v. *Grimes*, —— U.S. App. D.C. ——, 421 F.2d 1119 (1969).

[8] *E.g., Gordon* v. *United States, supra.*

[9] *Id.*

[10] *E.g., Brooke* v. *United States, supra*; *Watson* v. *United States*, D.C. App. No. 5048 decided February 17, 1970.

1966 larceny convictions. (H. 50-52). At the conclusion of the Government's case, appellant asked the trial court to reconsider its pre-trial *Luck* decision. At this point specific inquiry was made by the court as to appellant's defense. Satisfied that appellant's alibi could be presented by her mother,[11] the trial court reaffirmed its prior *Luck* ruling (Tr. 146-147).

In her argument that the trial court abused its discretion appellant misplaces reliance on *United States* v. *Coleman*, —— U.S. App. D.C. ——, 420 F.2d 1313 (1969). In *Coleman* the trial court did not even consider the importance of allowing the jury to hear the defendant's story. Accordingly, this Court held that the *Luck* hearing was insufficient when all that the trial judge did was note that "[a]nything to do with cheating and stealing is admissible." —— U.S. App. D.C. at ——, 420 F.2d at 1315. See also *Smith* v. *United States*, 256 A.2d 901 (D.C. Ct. App. 1969). The instant case is clearly distinguishable in that the trial court, before finally ruling the conviction admissible, made the discretionary conclusion that appellant's mother could present her alibi.[12]

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[11] THE COURT: Would you tender at this time what your defense would be?

MR. MURTHA: [defense counsel]: The defense would be that Miss Briggs was not—in other words an alibi defense. She wasn't there.

MR. HARRIS: [the prosecutor]: She has her mother.

MR. MURTHA: Her mother will testify on her behalf but her mother can only testify as to certain times, what happened as to a time after the defendant—in other words, she will only supply part of the story and if she is not—Miss Briggs is not allowed to testify part of her story will be missing, I think.

THE COURT: I am afraid I don't understand. The alibi is only for the period between six and 6:30 that you could consider.

MR. MURTHA: That's right.

THE COURT: Is she able to cover that period?

MR. MURTHA: Mrs. Briggs is, yes. She is able to cover from six o'clock on. (Tr. 146-147)

[12] Mrs. Brigg's testimony did in fact provide an alibi for appellant. She testified that on the morning of the robbery appellant came home between 5:30 and 6:00 A.M. and stayed in the house until 8:00 A.M. (Tr. 156-158). Since the robbery took place shortly

Appellee submits that the trial court was properly within its discretion in granting permission for the prosecutor to use the larceny convictions, and that "in accord with sound judicial administration, that discretion . . . [should] be accorded a respect appropriately reflective of the inescapable remoteness of appellate review." *Luck* v. *United States, supra* 121 U.S. App. D.C. at 157, 348 F.2d at 769.

**III. The photographic identification was not impermissibly suggestive.**

(Tr. 76, 124, 143) (H. 19-20, 32, 37, 41-43, 46).

Appellant urges this Court to reverse her conviction and condemn the police for the *mere* use of photographs as a means of pre-trial identification (Brief for Appellant at 15).

Appellant contends that because Mrs. Lynn recognized her by name when she entered the hotel and indicated this to Officer Cvetnick, there was no need for a pre-trial photographic confrontation. She claims the showing of photographs was neither "imperative," "essential" nor "urgent," nor were the police faced with "inconclusive clues". She cites *Simmons*,[13] *Stovall*,[14] and *Clemons*[15] in support of her unique exclusionary theory.

To begin with, we take issue with appellant's interpretation of these cases. Appellant rightly concedes that "this procedure [photographic identification] has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by

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after 6:00 A.M., a different version of appellant's whereabouts was placed before the jury. *Compare United States* v. *Coleman, supra*; with *Weaver* v. *United States*, 133 U.S. App. D.C. 66, 408 F.2d 1269 (1969).

[13] *Simmons* v. *United States*, 390 U.S. 377 (1968).

[14] *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[15] *Clemons* v. *United States, supra.*

allowing eyewitnesses to exonerate them through scrutiny of photographs" (Brief for Appellant at 15-16, citing *Simmons* v. *United States*, *supra* note 13, 390 U.S. at 384). Nowhere in *Stovall*, *Simmons*, *Clemons* or any other cases do we find a prohibition against the *mere* use of photographs as a means of identification. To the contrary, the Supreme Court said in *Simmons*, "We are unwilling to prohibit its [photographic identifications] employment, either in the exercise of our supervisory power, or still less, as a matter of constitutional requirement." 390 U.S. at 384. See also *United States* v. *Kirby*, D.C. Cir. No. 23,106, decided April 24, 1970. A failure by Officer Cvetnick to use photographs in the instant case would have been a dereliction of duty. He was told by Mrs. Lynn that a woman named "Polly" was one of the robbers (H. 19, 41-43, 46). At no time was Mrs. Lynn able to give him Polly's last name or whereabouts. Without being more certain as to which "Polly" was responsible for the crime, he certainly lacked probable cause to arrest anyone, and had appellant been arrested at this point, any lineup identification made would have been suppressible.[16] The officer's prompt employment of photographs was a necessary and reasonable practice at this point in his investigation and should be commended rather than condemned.

Appellant next claims that her pre-trial photographic identification violated due process. Appellant correctly recognizes that the due process test for photographs is "whether the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," *Simmons* v. *United States*, *supra*, 390 U.S. at 384, and that this is to be judged by an examination of the "totality of the circumstances". *United States* v. *Hamilton*, —— U.S. App. D.C. —— 420 F.2d 1292 (1969). However, appel-

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[16] *Compare Adams* v. *United States*, 130 U.S. App. D.C. 203, 206, 399 F.2d 574, 577 (1968), with *United States* v. *Greene*, D.C. Cir. No. 22,923, decided April 29, 1970, slip op. at 7-8 n. 7.

lant incorrectly describes the characteristics of the twelve photographs used in her case.

She claims that her photograph was the only one having bright white borders and a dividing line. Our examination of the pictures (which are included in the record on appeal) reveals that not only appellant's photograph (No. 9) but also photographs Nos. 1, 4, 5, 6, 8, 10 and 11 all have black dividing lines separating the two poses. Appellant characterizes all the photographs except her own as "somewhat hazy, fuzzy, or obscure" (Brief for Appellant at 17). We see nothing unclear about photographs Nos. 3, 5, 9 or 11. Appellant also claims that her dark skin was strikingly prominent whereas the skin color on the other photographs cannot be determined. An examination reveals that the persons in photographs Nos. 1, 6 and 9 have approximately the same skin pigmentation. We also take issue with appellant's claim that her photograph was the only one displaying short hair. Indeed, the women in photographs Nos. 1, 6 and 9 all have short hair. Next appellant contends that she looks ten years older than the rest of the women. In our view, the women in photographs 4 and 11 look as old as or older than appellant in No. 9.

While it is true that appellant's photographs are not bordered like the others, we fail to see how this factor makes the entire photographic identification impermissibly suggestive. If any of the photographs could be deemed overly suggestive, should it not be No. 2 (the only woman with a hat) or No. 3 (the only woman pictured in three poses)? We therefore fail to see any justification for appellant's assertion that "[t]he set of photographs exhibited to the witnesses was obviously 'rigged'" (Brief for Appellant at 18).

It is the relative likelihood of mistaken identification from photographs which we must keep in mind when evaluating appellant's due process claim. *Simmons* v. *United States*, *supra*, 390 U.S. at 385. Appellant was no stranger to Mrs. Lynn. The fact that she knew appellant

makes the identification even more trustworthy.[17] It is also clear from the record that the photographic identification of appellant by Mrs. Lynn was made quickly (H. 20, 43) and without any suggestions by the police[18] (H. 20, 32). The lighting conditions at the Fulton Hotel at the time of the robbery were unquestionably good (H. 37, Tr. 76, 124, 143), as was the lighting when Mrs. Lynn first saw appellant one year prior to the robbery (H. 37; Tr. 76, 124). Viewing the totality of the circumstances surrounding appellant's photographic identifications, we fail to see any merit in her due process violation contention. The trial court's determination that the identification was not unduly suggestive is amply supported by the record.

## CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
*United States Attorney.*

JOHN A. TERRY,
CHARLES H. ROISTACHER,
*Assistant United States Attorneys.*

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[17] This Court has stated that a witnesses' ability to furnish a detailed description of a suspect is to be considered when determining whether, under the totality of the circumstances, the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *United States* v. *Hamilton, supra,* —— U.S. App. D.C. at ——, 420 F.2d at 1294-95. Certainly, then, a witnesses' ability to give the police the *name* of the suspect makes a subsequent photographic identification highly trustworthy.

[18] See *United States* v. *Williams, supra.*

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